No. 86-1107

(3)

In The
Supreme Court Of The United States

OCTOBER TERM, 1986

DANIEL H. HENDERSON,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE STATE OF CONNECTICUT

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QUESTION PRESENTED

WHETHER THE TRIAL COURT DENIED THE PETITIONER HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY REFUSING TO CONDUCT AN EVIDENTIARY HEARING REGARDING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL RAISED FOR THE FIRST TIME IN BELATED POST JUDGMENT MOTIONS.

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CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Rule 17.1, Revised Rules of the Supreme Court of the United States

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or had decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by lower court, as to call for

an exercise of this Court's power of supervision.

(b) When a state court of last resort had decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals had decided an important question of federal law which has not been, but should be, settled by this Court, or had decided a federal question in a way in conflict with applicable decisions of this court.

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district

shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life,liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

Connecticut Practice Book § 903

Unless otherwise permitted by the judicial authority in the interests of justice, a motion for a new trial shall be made within five days after a verdict or finding of guilty or within any further time the judicial authority allows during the five-day period.

Connecticut Practice Book § 935

The judicial authority may at anytime correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in any illegal manner or any other disposition made in an illegal manner.

OPINION BELOW

The opinion of the Connecticut Appellate Court is reported at 8 Conn. App. 342, 512 A.2d 974 (1986), and is found in the petitioner's appendix at pages 1a - 7a.

JURISDICTION

The judgment of the Connecticut Appellate Court was entered on July 29, 1986. The Connecticut Supreme Court, by order dated October 29, 1986, denied a petition for certification to appeal from the Appellate Court decision. The petition for a writ of certiorari was filed on December 26, 1986. The jurisdiction of this Court is invoked under 28 United States Code § 1257(3).

STATEMENT

The petitioner was charged with a number of offenses in three separate informations. On January 25, 1985 the petitioner entered pleas of guilty to larcency in the second degree, forgery in the second degree, forgery in the third degree, larcency in the fifth degree and reckless endangerment in the second degree. Before accepting the petitioner's plea, the trial court, Mack, J., canvassed the defendant extensively concerning the voluntariness of his pleas. During the plea canvass, the petitioner expressly stated that no promises had been made to him in order to induce him to enter his pleas. The court then continued the case for a presentence investigation.

On March 29, 1985, the defendant

appeared before the trial court, Susco, J., for sentencing. Prior to imposing sentence, the court allowed the petitioner to withdraw his plea of guilty to larceny in the second degree and enter a plea of guilty to larceny in the thrid degree instead. Before accepting the petitioner's plea, the court again canvassed the petitioner concerning the voluntariness of his plea. The petitioner again expressly stated that no promises had been made to him to induce him to plead guilty. After accepting the petitioner's plea, the trial court sentenced him to an effective term of imprisonment for three years, execution suspended after eighteen months and three years probation thereafter.

On April 16, 1985, new counsel for the petitioner filed a motion for a new

trial purusant to Connecticut Practice Book § 903 and a motion to correct an illegal sentence pursuant to Connecticut Practice Book § 935. In his motions, the defendant claimed that his pleas of guilty were the result of misrepresentations made to him by his previous defense counsel. Petitioner's Appendix at 1c-4c. On May 15, 1985, the trial court, Susco, J., denied the defendant's motions.

The petitioner appealed to the Connecticut Appellate Court, assigning as error the denial of his motion for a new trial and motion to correct an illegal sentence. On appeal, the defendant claimed the trial court abused its discretion as a matter of Connecticut law in denying his motions. On July 29, 1986, the Appellate Court affirmed the petitioner's conviction. The petitioner

then filed a petition for certification in the Connecticut Supreme Court, claiming that the Appellate Court's decision was in conflict with the Connecticut Supreme Court's holding in State v. Leecan, 198 Conn. 517, 504 A.2d 480, cert. denied, 106 S. Ct. 2922 (1986). On October 29, 1986, the Connecticut Supreme Court denied the petitioner's petition for certification.

ARGUMENT

The instant petition for certiorari presents a remarkably frivoulous issue for this Court's consideration. The defendant contends that the trial court violated his right to effective assistance of counsel when it refused to conduct an evidentiary hearing concerning his claim of ineffective assistance of counsel which he raised for the first time eighteen days after the imposition of sentence. The petitioner argues that the preference of Connecticut courts for resolving such claims through habeas corpus proceedings rather than by post judgment motion or direct appeal "unreasonably burdens [him] with an irrational procedural requirement." Petition for certiorari at 10. The petitioner's tenuous claim does not warrant review by

this Court for serveral reasons.

First, the petitioner raised his constitutional claim for the first time in his petition for certiorari. In the trial court, the defendant did claim that his first defense counsel was ineffective. On appeal, however, the petitioner made no claim that the trial court's denial of his motions violated his rights under the Sixth Amendment of the United States Constitution. In the Connecticut Appellate Court, the petitioner claimed only that the trial court abused its discretion under the Connecticut Rules of Court. See Respondent's Appendix at A1-A8. After his conviction was affirmed, the petitioner sought review of the Appellate Court's decision in the Connecticut Supreme Court. In doing so. the petitioner again failed to raise a

federal constitutional claim. In his petition for certification to the Connecticut Supreme Court, the petitioner claimed only that the decision of the Appellate Court was in conflict with the Connecticut Supreme Court's ruling in State v. Leecan, supra. *1 See Respondent Appendix at A9, A10 - A15.

In Cardinale v. Louisiana, 394 U.S. 437, 89 S. Ct. 1162, 22 L.Ed.2d 398 (1969), this Court held that it would not "decide federal constitutional issues raised here for the first time on review of state court decisions." Id., 438. Moreover, Rule 17.1 of the Revised Rules of the Supreme Court of the United States

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1 In State v. Leecan, supra, 541, the Connecticut Supreme Court ruled that claims of ineffective assistance of counsel are more properly resolved in a habeas corpus proceedings than on direct appeal.

indicates that certiorari will be granted only when the issue has been ruled upon in a lower court. Here, the petitioner has clearly failed to raise his federal constitutional claim in the state courts below. Accordingly, this Court should decline to review his claim. See Michigan v. Long, 463 U.S. 1032, 1053, 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983); Fay v. Noia, 372 U.S. 391, 399, 83 S. Ct. 822, 9 L.Ed. 837 (1963).

Second, the petitioner has failed to establish any prejudice from the procedure employed by the Connecticut courts in resolving his claim of ineffective assistance of counsel. The petitioner claims that he was prejudiced by the trial court's ruling because his claim cannot be resolved in a collateral proceding until after he has served his

entire sentence.*2 The petitioner, however, has neglected to inform this Court that he was released on bond pending the outcome of his appeal. While free on bond, the petitioner filed a petition for a writ of habeas corpus in the Connecticut Superior Court raising the same claim which underlies this petition for certiorari. On December 2 and 3, 1986, twenty three days before he filed his petition to this Court, the defendant was afforded a full evidentiary hearing on his claim. Although the petitioner's request for bond was denied by the court hearing his habeas corpus petition, the State has made no effort to incarcerate him pending the outcome of

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2 The petitioner incorrectly states that he was sentenced to incarceration for six months. In fact, he was sentenced to incarceration for eighteen months. State v. Henderson, supra, 343.

his habeas corpus petition. *3 Thus, contrary to the petitioner's assertion, he will obtain a ruling on his claim prior to serving his entire sentence.

Finally, there is no merit to the petitioner's claim that the Connecticut procedure for resolving claims of ineffective assistance of counsel violated his Sixth Amendment rights. The petitioner first raised his claim of ineffective assistance of counsel eighteen days after the imposition of sentence and thirteen days after the expiration of time permitted for filing a motion for a new trial. The petitioner apparently contends that his belated invocation of the Sixth Amendment

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3 The court's decision on the petitioner's state habeas corpus petition is still pending at this time.

entitled him to reopening of his case. This Court, however, has frequently recognized the state's interest in the finality of judgment in criminal prosecutions. See e.g., Engle v. Issac, 456 U.S. 107, 127, 102 S. Ct. 1558, 71 L.Ed. 783 rehearing denied, 456 U.S. 1001 (1982); Wainwright v. Sykes, 433 U.S. 72, 90, 97 S. Ct. 2497, 53 L.Ed. 594 (1977). Accordingly, the trial court reasonably concluded that the petitioner's Sixth Amendment claim was more appropriately resolved through a petition for a writ of habeas corpus.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

THE RESPONDENT
STATE OF CONNECTICUT

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APPENDIX

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EXCERPTS FROM PETITIONER'S BRIEF
TO THE CONNECTICUT APPELLATE COURT

I. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO CORRECT ILLEGAL SENTENCE AND HIS MOTION FOR NEW TRIAL

A. The Guilty Pleas Were Obtained In Violation Of Mr. Henderson's Rights Under The Sixth And Fourteenth Amendments To The United States Constitution And Article I, Section 8, Of The Constitution Of Connecticut

. . . .

The court having chosen to hear no evidence on Mr. Henderson's motions, the allegations in the accompanying affidavits must be deemed to be true for present purposes. Those allegations unquestionably demonstrate gross violations of the Sixth and Fourteenth Amendments to the United States Constitution and of Article I, Section 8, of the Connecticut Constitution, rendering the pleas involuntary and invalid.

A guilty plea entered as a result of an affirmative misrepresentation by defense counsel of the sentence which will be imposed as a result must be set aside. E.g., McAleney v. United States, 539 F.2d 282 (1st Cir. 1976); O'Tuel v. Osborne, 706 F.2d 498 (4th Cir. 1983); United States v. Russell, 686 F.2d 35 (D.C. Cir. 1982); Hornak v. Warden, 40 Conn. Sup. 238 (1985). See also United States v. Rumery, 698 F.2d 764 (5th Cir. 1983); United States ex rel. Ferris v. Finkbeiner, 551 F.2d 185 (7th Cir. 1977). The fact that the defendant, acting in response to his lawyer's misrepresentations, himself denied at the guilty plea proceeding that any such promises had been made to him -- all of which he explained to the court in his post-plea affidavit -- does not preclude him from

raising the issue after plea or the court from considering and acting upon it. United States v. Blackner, 721 F.2d 703, 709 (10th Cir. 1983).

The evidence before the court on the motions was clear and undisputed that the gross misrepresentations had taken place and that without those misrepresentations no guilty plea would have entered. Accordingly, the defendant met the test of Hill v. Lockhart, ___ U.S. ___, 54 U.S.L.W. 4006 (1985), and his pleas should have been -- and should now be-- set aside.

B. Mr. Henderson's Motions To Correct And For New Trial Were Proper Vehicles For Presenting This Issue To The COurt, And Accordingly Should Have Been Granted

Mr. Henderson raised at the earliest possible time, given his circumstances, the matters now before this court on

appeal. The facts were squarely presented to the court within twenty days of judgment -- indeed, in the case of No. A.C. 4206, in which plea and sentencing were on the same day, within twenty days of the date of the guilty plea. The relevant facts are precisely the same as those in State v. Anonymous (1980-9), 36 Conn. Sup. 578, 421 A.2d 557 (App. Sess. 1980), in which eighteen days after plea and sentencing a defendant moved to vacate judgment and withdraw his plea. In that case, to be sure, the state did not challenge the procedural device utilized to being the matter before the court. Were it invalid, however, the court would have been without jurisdiction to order the relief it did. The fact that the court did vacate the plea is at least some evidence that the

procedural device utilized was a proper one.

Mr. Henderson filed alternative motions in an effort to assure that the trial court would have before it an appropriate tool to dispense what justice in this case clearly required. One of his motions was a motion for a new trial. Although that motion was filed more than five days after judgment, Section 903 of the Practice Book permitted the court "in the interests of justice" to entertain the motion at a later time. Since the time for taking a direct appeal had not yet run when the motion was presented, the court clearly had power to hear the motion for a new trial. Since the relief requested was unquestionably required if the supporting affidavits were credited, and the new trial motion allowed the

sentencing judge herself to consider the matter and rule rather than forcing the case upon a habeas corpus judge unfamiliar with the case, and the reason for Mr. Henderson's inability to file within five days of judgment was obvious and compelling, the interests of justice clearly required that the motion be heard and decided on its merits. The failure to do so, and especially the failure to articulate any reason for not doing so, must be held an abuse of discretion.

Mr. Henderson's Motion to Correct was filed pursuant to Practice Book § 935, which provides: "The judicial authority may <u>at anytime</u> correct . . . any other disposition made in an illegal manner." (Emphasis supplied.) The motion and its supporting affidavits demonstrated that an illegal disposition

had been made in these cases. The trial court clearly had jurisdiction to hear and decide the motion on its merits.

Both motions unquestionably were timely. Being timely, they were procedurally correct mechanisms with which to raise the issue tendered. According to the allegations of the uncontradicted affidavits, a gross violation of law and miscarriage of justice had been committed. Under either motion, the court was empowered to set aside the manifestly illegal judgments in the cases and set them down for trial.

The only circumstances under which the court could properly have denied the motions before it would have been an explicit finding by the court that the allegations contained in the affidavits were untrue. Yet no hearing was held and

no opposing evidence of any sort was considered by the court. Consequently, the allegations of the affidavits must be presumed true. The court was obliged, therefore, to address those allegations and grant the relief requested.

CONCLUSION

This case must be remanded to the Superior Court with directions either to grant either the motion for new trial or the motion to correct, by setting aside the judgments in the cases and granting Mr. Henderson the trials he seeks, or in the alternative to grant Mr. Henderson and the state an evidentiary hearing on those motions.

ISSUE PRESENTED BY PETITIONER FOR CERTIFICATION TO THE CONNECTICUT SUPREME COURT

ISSUES PRESENTED

I. Under State v.State v. Leecan, 198 Conn. 517 (1986), must a claim of ineffective assistance of trial counsel be raised only by a Petition for Writ of Habeas Corpus when the issue is fully presented to the trial court less than twenty (20) days after entry of judgment?

EXCERPTS FROM PETITIONER'S PETITION FOR CERTIFICATION TO THE CONNECTICUT SUPREME COURT

I. UNDER STATE V. LEECAN, 198 CONN. 517 (1986), A CLAIM OF INEFFECTIVE ASSISTANT OF TRIAL COUNSEL NEED NOT BE RAISED ONLY BY A PETITION FOR WRIT OF HABEAS CORPUS WHEN THE ISSUE IS FULLY PRESENTED TO THE TRIAL COURT LESS THAN TWENTY DAYS AFTER ENTRY OF JUDGMENT

Without question, if the Petitioner is able to prove to the satisfaction of the Court the allegations contained in the papers he filed below, he will have made out a sufficient claim of ineffective assistance of counsel entitling him as a matter of constitutional law to set aside the judgment entered against him. United States Constitution, Amendments 6, 14; Connecticut Constitution, Article I, Section 8; McAleney v. United States, 539 F.2d 282 (1st Cir. 1976); O'Tuel v. Osborne, 706 F.2d 498 (4th Cir. 1983);

United States v. Russell, 686 F.2d 35 (D.C. Cir. 1982); Hornak v. Warden, 40 Conn. Sup. 238 (1985).

A prior decision by the predecessor to the current Appellate Court permitted a defendant to move to vacate judgment and withdraw his plea eighteen (18) days after judgment had entered. State v. Anonymous (1980-9), 36 Conn. Sup. 578, 421 A.2d 557 (App. Sess. 1980). In that case, to be sure, the State did not contest the procedural device used. undoubtedly, however, the State chose not to contest that device for precisely the reasons that the Court here should permit it to be used -- judicial economy and fundamental fairness.

The reasoning which underlies State v. Leecan requires that defendants under circumstances like those presented by

this case not be required to utilize habeas corpus as the mechanism for raising claims of ineffective assistance of counsel. The very point of State v. Leecan is that Appellate Courts are not finders of fact and cannot do justice to the necessarily conflicting claims involved in assertions of ineffective assistance of counsel since they lack the benefit of a full elaboration of the facts at an evidentiary hearing. When the issue in question is adequately tendered, as here, to the very trial court which witnessed the performance of the attorney and is presented to that court before the time for taking an appeal has expired, that court clearly has the authority under Sections 903 and 935 of the Practice Book to conduct the very evidentiary hearing which an

Appellate Court needs. Moreover, the trial court is better suited than a habeas corpus court to conduct such a hearing, since the trial court has had the benefit of actually witnessing the performance of the attorney whose conduct is under challenge.

Moreover, the savings in judicial resources by following the procedure sought by Petitioner here would indeed be substantial. A new judge would not be required to become familiar with the record of the case. The matter would be heard almost immediately upon the close of the proceedings under attack so that neither side would suffer the prejudice which inevitably follows during long periods of delay, such as failed recollection, lost witnesses or missing records. Thus, the public interest in

expediting and reducing the time and inconvenience involved in judicial proceedings would be served, as would the interest of the State in being afforded the very best possible opportunity to meet the challenge. Defendants raising the claim of ineffective assistance of counsel, of course, clearly would benefit by being given an opportunity to be heard before having served all or most of any sentence of incarceration imposed. All of these considerations argue in favor of using such procedure in this particular case. More important for present purposes, however, they are reasonable and sensible procedures which ought to be followed in all cases.

This case gives this Court the opportunity to make it clear that state v. Leecan does not prohibit utilization

of this sensible and economical procedure in cases of this kind. Accordingly, certification should be granted.

CONCLUSION

For the reasons stated above, certification should be granted as requested.